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Nos. 85-971 and 85-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

SECURITY PACIFIC NATIONAL BANK,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF BRANCH BANKING AND TRUST COMPANY, ET AL., AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

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BRIEF OF BRANCH BANKING AND TRUST COMPANY, ET AL., AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

This *amici curiae* brief is filed with the consent of the parties in Nos. 85-971 and 85-972.[1] The brief supports the respondent in these two consolidated cases.

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[1]The originals of the letters of consent have been filed with the Clerk of this Court.

INTEREST OF AMICI CURIAE

The *amici* on whose behalf this brief is filed are six commercial banks operating in North Carolina: (1) Branch Banking and Trust Company; (2) First Union National Bank; (3) NCNB National Bank of North Carolina; (4) The Planters National Bank & Trust Company; (5) United Carolina Bank; and (6) Wachovia Bank and Trust Co., N.A. These six *amici* are the six petitioners in No. 86-76, *Branch Banking and Trust Company, et al.* v. *National Credit Union Administration Board, et al.* The *amici* filed their petition for writ of certiorari on July 21, 1986. It is presently pending before the Court, and will likely be held until the Court resolves the instant consolidated cases. The petition seeks review of the Fourth Circuit's ruling in *Branch Bank and Trust Company, et al.* v. *National Credit Union Administration Board, et al.*, 786 F.2d 621 (4th Cir. 1986).[2]

The filing of this *amici* brief is motivated by the fact that the Fourth Circuit's opinion in the *Branch Banking* case raises substantially the same competitor standing problem, under the "zone of interests" test, as involved in Nos. 85-971 and 85-972. Indeed, as the *Branch Banking* petition points out, the Fourth Circuit's use of the test to reject competitor standing conflicts with the District of Columbia Circuit's use of the test to confer competitor standing on the respondent association in this proceeding. The *amici* thus have a direct concern with the debate before this Court as to the proper meaning and application of the "zone of interests" test.

The *amici* are not here concerned with the merits of the question before the Court as to whether national bank of-

[2]The caption of the Fourth Circuit's opinion, as reported in 786 F.2d 621, incorrectly refers to "Branch Bank and Trust Company." The correct name is "Branch Banking and Trust Company."

fices offering only discount brokerage services are "branches" within the meaning of Section 7(f) of the McFadden Act, 12 U.S.C. § 36(f). Their only concern is with the standing of a competitor, like the respondent association, to protest an arguably wrong interpretation of a federal statute regulating the competing interests, i.e., the national banks. It is the standing of the respondent association to raise that question that links this case to the *Branch Banking* case. Like the respondent association, the *amici* banks seek standing to raise such a question in their capacity as competitors of the regulated competing interests, i.e., federal credit unions. Like the respondent, the *amici* have been competitively injured as the result of an arguably erroneous statutory interpretation. And like the respondent, the *amici* argue that they fall precisely within the narrow and intended scope of the "zone of interests" standing test, a formula originally designed by this Court to test standing only in the competitor context. *Association of Data Processing Organizations* v. *Camp*, 397 U.S. 150, 153 (1970).

In rejecting the standing arguments of *amici* in *Branch Banking*, the Fourth Circuit developed a somewhat more sophisticated and in-depth analysis of the problem than have other lower courts, including the District of Columbia Circuit *per curiam* ruling here under review. *Amici* believe that this brief, which reflects and critiques the Fourth Circuit's viewpoint, will be of some assistance to this Court in resolving this difficult and recurring problem.[3]

[3]The Solicitor General represents the petitioner Clarke in No. 85-971. His brief on the merits (see pp. 15, 18, 24) makes use of the *Branch Banking* rationale of the Fourth Cirucit. The Solicitor General also represents the federal respondents in the *Branch Banking* petition for writ of certiorari.

SUMMARY OF ARGUMENT

This case involves important questions as to the meaning and application of the prudential "zone of interests" standing test. The test originated with this Court's decision in *Association of Data Processing Organizations* v. *Camp*, 397 U.S. 150, 153 (1970). As there stated, the test is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Particular note should be made of the use and placement of the word "arguably" in this formulation of the test.

It bears emphasis at the outset that the zone of interests test was born of this Court's desire to enhance rather than diminish competitor standing. At least three considerations mentioned in the *Data Processing* opinion testify to that desire. First, since the case had been instituted under the Administrative Procedure Act, the *Data Processing* opinion placed heavy reliance on the trend under that Act "toward enlargement of the class of people who may protest administrative action," including enlargement of the statutory category of aggrieved "persons." Second, the Court likened aggrieved competitors to "reliable" private attorneys general to litigate such public issues as unlawful competition. Third, *Data Processing* made it quite explicit that it designed the zone test in order to liberalize and expand the pre-existing "legal interest" test for competitor standing. See, e.g., *Tennessee Power Co.* v. *TVA*, 306 U.S. 118, 137-138 (1939), holding that a competitor had standing only if possessed of a legal right or interest, such as one founded on a statute.

Much of the difficulty and confusion among the lower courts about the zone test stems from a seeming inability

to distinguish between the narrow "legal interest" test and the more liberal "arguably within the zone of interests" test. Such confusion is also evident in the briefs of the petitioners in this case. For the most part, the arguments in those briefs relate to the viability and justification of the "legal interest" test, which remains a part of but is not the dominant theme of the *Data Processing* "zone of interests" test. Thus the standing problem in this case is not whether competitors have standing by virtue of possessing some "legal interest" within the statutory zone of interests, but whether competitors who assert an interest in being free from unlawful competition by regulated businesses are "arguably" within the statutory zone of interests.

A close analysis of the *Data Processing* zone test reveals two distinct strands or prongs. The first strand incorporates the old "legal interest" test, and asks the question whether the aggrieved competitor is "clearly" within the protected or regulated zone of interests. An application of this "legal interest" prong is found in *Barlow* v. *Collins*, 397 U.S. 159, 164 (1970), decided the same day as *Data Processing*. After an intense inquiry into the relevant statute and its legislative history, *Barlow* found that the complainants were "clearly" within the statutory zone because Congress intended that their interests be protected. But, to repeat, this "legal interest" strand, this *Barlow* precedent, is not in issue before the Court in this case.

What is at issue is the newer and broader strand of the *Data Processing* zone test, epitomized by the *Data Processing* case itself. That aspect of the test requires that the competitor's interest be only "arguably" — not necessarily "clearly" — within the statutory zone. In applying that standard to the facts of the case, *Data Processing* carefully eschewed any substantial reliance on legislative history or

intent. By reference to the Administrative Procedure Act, the Court felt that the only pertinent inquiry was to discover if Congress had sought to preclude judicial review of the challenged administrative action. Having found no preclusion, the Court proceeded to hold that the aggrieved competitors, having asserted a right to be free from unlawful competition, were "arguably" within the zone of protected interests, from which the competitors' injuries had emanated. Hence the competitors had standing to challenge the administrative order that had caused the competitive injuries.

Stated differently, *Data Processing* holds that when a statute authorizes a regulated industry to engage in certain but limited marketplace activities, a statutory zone of competitive interests has been created. As long as the regulated or protected interests operate and compete within the parameters of the authorized zone, any competitive injuries received by unregulated competitors are considered *damnum absque injuria*. But if an administrative agency orders or permits the regulated interests to operate outside the defined zone, the administrative action is not only unlawful but it causes the resulting competition to be unlawful. The unregulated competitor's complaint that there has been an invasion of the right to be free from unlawful competition is enough to bring the competitor "arguably" into the statutory zone of interests and to give standing to attack the administrative action. It cannot be assumed that Congress intended to authorize unlawful competition or to permit illegal administrative action.

To permit competitor standing under the second and dominant prong of the *Data Processing* test does not implicate or violate any aspect of the separation of powers doctrine. Indeed, judicial review of unlawful administrative action is quite consistent with that doctrine, as well as with our theory of checks and balances.

ARGUMENT

This case, like the pending petition for certiorari in the *Branch Banking* case, involves important questions as to the meaning and application of the prudential "zone of interests" standing test. What is the purpose, the *raison d'etre*, of the test? Is it designed to close the doors of the federal courts to all aggrieved competitors who are not expressly or impliedly among the beneficiaries of the statutory scheme in question? Or is the purpose to confer standing on competitors who suffer from "arguably" unlawful competition traceable to administrative action in excess of statutory authority? And what is the relationship between the "arguably within the zone" test and the earlier "legal interest" test for standing?

These are not easy questions. The answers supplied by the briefs of the two petitioners are either non-existent or seriously flawed, and seem inconsistent with what this Court has said with respect to the zone test A basic reexamination of the test is in order.

Such a reexamination must start with a restatement of the zone test, as set forth by this Court in *Association of Data Processing Organizations* v. *Camp*, 397 U.S. 150, 153 (1970). Note should be made of the presence and position of the word "arguably," particularly since the word is omitted from nearly all the references to the test in the briefs of the petitioners.[4] In context and in full, the *Data Processing* zone formula reads:

[4]Thus in referring to the *Data Processing* formulation of the test, the Solicitor General's brief (at 13-14) omits the word "arguably" by quoting from a brief reference to the zone test in *Valley Forge Chris-*

The "legal interest" test goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Thus the Administrative Procedure Act grants standing to a person "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1964 ed., Supp. IV) . . . . We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners [the competitors] rely here. Certainly he who is "likely to be financially" injured, *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 477, may be a reliable private attorney general to litigate the issues of the public interest in the present case. [397 U.S. at 153-154].

1. The zone test is designed to enhance rather than diminish competitor standing.

A fair reading of the *Data Processing* opinion indicates that the "arguably within the zone" test was created primarily to promote competitor standing, not to discourage it. That is evident from at least three considerations mentioned in *Data Processing:*

(a) In the passage quoted above, the Court clearly

tian College v. *Americans United*, 454 U.S. 464, 475 (1982). *Valley Forge* referred to the zone test as a requirement "that the plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question' " (quoting from *Data Processing*). A similar reference to the zone test, omitting the word "arguably," is found in *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). The reason for omitting the word is not clear, although the zone test was not in issue in either *Valley Forge* or *Allen*.

equated an aggrieved competitor with a person "aggrieved by agency action" within the meaning of the Administrative Procedure Act. As the Court observed two paragraphs later (at 154), the whole trend under that Act "is toward enlargement of the class of people who may protest administrative action [and] [t]he whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend." To the same effect, see *Arnold Tours* v. *Camp*, 400 U.S. 45, 46 (1970).

(b) The Court also likened an aggrieved competitor, in the passage quoted above, to "a reliable private attorney general to litigate the issues of the public interest," such as the statutory problem in the instant case. A private attorney general is not ordinarily among the persons that Congress intends to benefit or regulate when it creates a statutory scheme of regulation.

(c) As the *Data Processing* opinion explains, 397 U.S. at 152-153, the "arguably within the zone" test was deliberately crafted to liberalize and expand the earlier "legal interest" test for competitor standing. Prior decisions of the Court had limited competitor standing to those who could claim some invasion of a legal right or interest. *Tennessee Power Co.* v. *TVA*. 306 U.S. 118, 137-138 (1939), had defined a competitor's legal right or interest as "one of property, one arising out of a contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." See also *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 4798 (1938) ("violation of a legal right"); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125 (1940) ("invasion of recognized legal rights").[5]

[5]As Professor Wright has written, "Such an approach is demonstrably circular: if the plaintiff is given standing to assert his claims, his interest is legally protected; if he is denied standing, his interest is not legally protected." C. Wright, *The Law of Federal Courts* 65-66 (4th ed. 1983).

Thus, by broadening competitor standing beyond the narrow confines of the "legal interest" concept, *Data Processing* means that competitors may have standing even when the asserted competitive interest is not "one founded on a statute which confers a [competitive] privilege" or is not one arising out of property, contract or tort law.

Data Processing and its more generous view of competitor standing stand in sharp contrast to the arguments advanced by the petitioners in this case. Their contention, which has been adopted by some lower courts, is that a court, in applying the *Data Processing* zone test, "must discern whether the interest asserted by a party [a competitor] in the particular instance is one intended by Congress to be protected or regulated by the statute under which suit is brought." *Control Data Corp.* v. *Baldrige*, 655 F.2d 283, 293-294 (D.C. Cir.), cert. denied, 454 U.S. 881 (1981). The argument then proceeds to an intense search of legislative history to discover whether Congress really did intend to regulate or protect the competitive interest being advanced by the aggrieved competitor. Only if one concludes that the statute does protect the competitors' interests does one say that those interests fall within the "zone of interests" protected by the statute, thereby conferring standing on the competitors.

Such an argument, such an interpretation of the *Data Processing* zone test, is unacceptable. It takes all the liberalization out of the test for determining competitor standing. By asserting that we must discern whether Congress did intend to protect or regulate the interest asserted by the competitor, this contention becomes nothing more than a resurrection of the abandoned "legal interest" limitation on standing. It is difficult to discern any meaningful difference between the "legal interest" requirement that the competitor's interest be "founded on a statute

which confers [such] a privilege" and "zone of interests" requirement that the competitor's interest be "one intended by Congress to be protected or regulated by the statute." The "arguably within the zone" test would thus revert to the more limited "legal interest" test.

Surely the *Data Processing* concept of competitor standing must have more meaning than the legal interest concept. It must be more than an exclusionary rule. It must have been designed to confer standing on some competitors who could not be said to have some legal interest or benefit founded on the statute in question. And so we turn to an examination of the broader aspects of the "zone of interests" test.

2. The zone test confers standing on competitors whose interest in being free from unlawful competition is "arguably" within a statutory "zone of interests."

Much of the confusion surrounding the zone test dissipates upon a careful reading of the *Data Processing* formulation. The precise wording of the test, which emphasizes the word "arguably," bears repetition at this point. In *Data Processing* language, the test is "whether the [competitive] interest sought to be protected by the complainant [the competitor] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[6] 397 U.S. at 153.

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[6]The *Data Processing* zone test has been applied only once by this Court in respect to a constitutionally protected zone. In *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 320 n. 3 (1977), the Court held that stock exchanges asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business are "arguably within the zone of interests to be protected" by the Commerce Clause.

To begin with, this test is satisfied if the competitor can show, by reference to statutory langauge or intent, that competitive interests are "clearly" within the zone of interests protected or regulated by the relevant statute. But the test is not limited to those who can make such a "clear" showing. The test is also satisfied if the competitor's interest is only "arguably" within the zone of statutory interests. In other words, the *Data Processing* standing test can be met in either of two ways, each of which calls for a different analysis.

(a) The decision of this Court in *Barlow* v. *Collins,* 397 U.S. 159, 164 (1970), announced simultaneously with *Data Processing,* illustrates how the zone test can be satisfied by a showing that the complainant's interests "are clearly within the zone of interests" protected by the relevant statute. The interests of the complaining tenant farmers in *Barlow* were found to fall "clearly" within the statutory zone because "[i]mplicit in the statutory provisions and their legislative history is a congressional intent that the Secretary protect the interests of the tenant farmers . . . [and] the relevant statutes expressly enjoin the Secretary to do so." *Id.*

There are several lessons to be drawn from the *Barlow* application of the *Data Processing* test. First, the clarity with which an interest may be said to fall within the statutory zone becomes apparent only after an intensive inquiry into the statutory language and the legislative history — all designed to determine if Congress did indeed intend to protect or regulate the asserted competitive interest. Second, once the inquiry makes clear that Congress did intend to protect such an interest, the competitor has actually asserted a legal right or interest "founded on a statute which confers a privilege," *Tennessee Power Co.* v. *TVA,* 306 U.S. 118, 137-138 (1939). And the competitor would

then have satisfied the old "legal interest" standing test, which shows that the new zone test incorporates rather than abolishes the earlier test. Third, *Barlow* indicates that when the competitor's interest has been shown to fall "clearly" within the zone it becomes unnecessary to inquire whether that interest "arguably" falls within the zone.

(b) *Data Processing* itself illustrates the second strand of the zone test, whereby the competitor's interest need only be "arguably" within the statutory zone of interests. In that case, companies that offered data processing services to the general business community were held to have standing to seek judicial review of a ruling by the Comptroller of the Currency that national banks could make data processing services available to other banks and to bank customers. The statute that created the relevant "zone of interests" was § 4 of the Bank Service Corporation Act of 1962. That section provided that national banks may not "engage in any activity other than the performance of bank services for banks." Nothing was said about authorizing national banks to compete in offering any kind of nonbank services. Yet the Court without hesitation concluded that the interests of the data processing competitors were "arguably" within the "zone of interests" to be protected or regulated by § 4 of the Bank Service Corporation Act.[7]

[7] In only two other cases has this Court applied the "arguably" test in the context of competitors. In *Arnold Tours* v. *Camp,* 400 U.S. 45 (1970), travel agents serving the general public were held to have standing, under the zone test, to challenge an administrative ruling allowing national banks to provide travel services for their customers. In *Investment Co. Institute* v. *Camp,* 401 U.S. 617 (1971), open-end investment companies were held to have standing, under the "arguably" test, to challenge an administrative ruling authorizing national banks to establish and operate collective investment funds, in competition with the investment companies.

What are the lessons to be drawn from this application of the "arguably within the zone of interests" strand of standing requirements? First, the *Data Processing* opinion carefully eschews any intensive inquiry into legislative history or congressional intent in defining the zone of "arguable" interests. To do so, said the Court, would "implicate the merits." 397 U.S. at 156. Moreover, such an implication was precisely what made the "legal interest" test so limited in usefulness. *Id.*, at 153.[8] Second, *Data Processing* teaches that, in cases brought pursuant to the Administrative Procedure Act, the only pertinent inquiry into the scope and intent of the relevant statutes is to discover if Congress "sought to preclude judicial review of administrative rulings by the Comptroller as to the legitimate scope of activities available to national banks under these statutes." *Id.*, at 157. In *Data Processing,* the Court concluded from its survey of the relevant statutes that the "competitors of national banks which are engaging in data processing services, are within that class of 'aggrieved' persons who, under § 702, are entitled to judicial review of 'agency action.' " *Id.*

The final lesson to be drawn from *Data Processing* concerns the "argument" that brings a competitor's interest "arguably" within the statutory zone, especially when the statute is silent on the matter. The clearest answer is found in a subsequent decision, *Investment Co. Institute* v. *Camp,* 401 U.S. 617, 620 (1971). The Court there summarized the *Data Processing* decision as a holding "that Congress had arguably legislated against the competition that the petitioners sought to challenge, and from which flowed their injury . . . [and] that whether Congress had indeed

[8] "In *Data Processing* we did not rely on any legislative history showing that Congress desired to protect data processors alone from competition." *Arnold Tours,* 400 U.S. at 46.

prohibited such competition was a question for the merits" *Id.*

In other words, when a statute authorizes a regulated business to engage in certain marketplace activities, a statutory zone of competition has been legislatively created. An unregulated competitor of such a regulated business has no right to complain about the legitimate and authorized competition emanating from that statutory zone; any injury is *damnum absque injuria.* But unlawful competition by the regulated businesses makes the unregulated competitor "significantly involved in activities affected by those [within the zone] who are regulated." C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure,* Vol. 13, § 3531.7, p. 512, n.16 (1984). The competitor can then assert a "right to be free from unlawful competition."[9] and therefore can challenge the legality of some administrative ruling that unlawfully expands the competitive zone, thereby causing competitive injury.

The challenger's interest in being free from unlawful competition by those within the protected or regulated zone "arguably" has the effect of thrusting the competitor's interest into the zonal melee. And if the competitor alleges a *substantial* claim of injury from such unlawful competition, the competitor has standing to argue the merits of the legality of the administrative ruling. This is what is meant by the *Data Processing* formula

[9] *Chicago* v. *Atchison, T. & S.F.R. Co.,* 357 U.S. 77, 83 (1958), a case approvingly cited in *Data Processing,* 397 U.S. at 154-155. In the *Chicago* case, a long-established transfer company was held to have standing to challenge the failure of a new and competing transfer company to obtain a certificate of necessity as required by a new city ordinance. The challenger's standing was said to arise from an actual controversy in which it "has a direct and substantial personal interest in the outcome." *Id.*, at 83.

that the competitor be "arguably within the zone of interests." In terms of the *Data Processing* facts, it was thus "arguable" that the Comptroller's ruling was so erroneous, so contrary to the legislative intent, that Congress could be said to have "arguably legislated against the [unlawful] competition [by the national banks] that the petitioners sought to challenge." *Investment Co. Institute, supra,* at 620.[10]

The arguability prong of the zone test comes back to the simple proposition that "palpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review." *Sierra Club* v. *Morton,* 405 U.S. 727, 733-734 (1972). The only uniqueness here is that the injured party is a competitor, and the injury is a competitive one. Prior to *Data Processing,* such an aggrieved competitor could rarely find standing to challenge agency action under the strictures of the "legal interest" test. *Data Processing* broke the shackles of that test. No reason is apparent for putting those shackles back on competitors. To do so would effectively preclude them from showing that they are victims of unlawful competition and from obtaining judicial review of arguably unlawful administrative action.

[10]The facts in the *Branch Banking* case are even more compelling than those in *Data Processing.* The statute involved in *Branch Banking,* the Federal Credit Union Act, specifically provides that federal credit union membership "shall be limited" to groups having "a common bond of occupation or association." The federal adminstrator granted a charter to a group allegedly lacking such a common bond. Such an improper charter grant rendered unlawful the credit union's ensuing competition with the *amici* banks. Under *Data Processing* analysis, the banks were "arguably" injected into the statutory zone and thus should have standing to challenge the grant of the charter.

3. Application of the Data Processing zone test to competitors is fully consistent with the separation of powers doctrine.

Without distinguishing between the two prongs of the zone of interests test — the "clearly" and the "arguably" prongs — the petitioners in this proceeding, like some of the lower courts, assert that the zone test "serves largely to safeguard separation of powers principles, by 'secur[ing] the benefits of a statutory program for the groups that Congress intended to benefit.' *Leaf Tobacco Exporters Ass'n* v. *Block,* 749 F.2d 1106, 1111 (4th Cir. 1984)." Brief for the Federal Petitioner, p. 15 (No. 85-971). Reference is also made, *id.,* to the Fourth Circuit's additional comment in the *Branch Banking* case, 786 F.2d at 622-623, that because "it is primarily the province of Congress to consider and weigh the interests of those potentially affected by legislation and subsequent administrative action," application of the zone test ensures that persons consciously excluded from the administrative process will not be able to manipulate the statutory scheme to achieve purposes outside the contemplation of Congress.

Such comments miss the mark. They are directed at a standing problem that is not before the Court. As the *Data Processing* opinion said with emphasis: "The present is a *competitor's* suit." 397 U.S. at 152. It is not a suit about securing the benefits of a statutory program for groups that Congress did or did not intend to benefit. Nor is it a suit about conferring standing on persons or competitors who have been consciously excluded from a federal program or the administrative process. The competitors we are talking about are not trying to redo the legislative battle or to manipulate the courts into granting protection of an interest that Congress deliberately withheld. In short, we are not concerned here with a competitive interest that is "clearly" outside the statutory zone of interests, a situa-

tion where a competitor may lack standing under the "legal interest" prong of the zone test. If that were the case, the sentiments expressed by petitioners might be applicable.

What this case does involve is the second or "arguably" prong of the zone test, the prong that petitioners do not even acknowledge, let alone address. That is the prong that was applied in *Data Processing* and in the lower courts in the instant situation. It involves the situation where the competitor's claim of a right to be free from unlawful competition "arguably" comes within the zone of interests. It is a situation where those who are regulated have been authorized, by an allegedly erroneous and unlawful administrative ruling, to compete, to the detriment of competitors, outside the legitimate bounds of the statute. All that those competitors seek is judicial review of the erroneous administrative ruling, a ruling that concededly caused their competitive injury.

By no measure can it be said that allowing such an aggrieved competitor to challenge the administrative ruling upsets the statutory pattern or disrupts the separation of powers doctrine. The "arguably" prong of the zone test, like all other prudential limitations on standing, has a close relationship to the policies reflected in the Article III case or controversy requirement; and that requirement is an integral part of the separation of powers doctrine. But it is equally clear that the separation doctrine contemplates that the judiciary, as a separate branch, will allow such suits as are necessary to check and balance excessive or illegal action by either of the other two branches. That is the only separation of powers consideration in this case, a consideration too obvious to belabor.

Nor need there be fear that to reaffirm the *Data Processing* "arguably" test will result in encouraging frivolous

lawsuits or in opening the federal court doors to literally thousands of injured competitors. As Circuit Judge Tamm once said, "[t]he spectre of opening a Pandora's box of litigation has always seemed groundless to us, particularly in the area of standing to sue." *Scanwell Laboratories, Inc.* v. *Shaffer,* 424 F.2d 859, 872 (D.C. Cir. 1970). No one has claimed or could claim that the *Data Processing* decision in 1970 has resulted in an avalanche of competitor suits claiming interests that are arguably within the zone of statutory interests.

CONCLUSION

For these various reasons, the judgment of the Court of Appeals for the District of Columbia Circuit respecting the application of the "zone of interests" standing test should be affirmed. *Amici* express no opinion on the other issues incorporated in that judgment.

Respectfully submitted,

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